BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RITA BRICE	)	
Claimant	)	
	)	
VS.	)	
	)	
MANOR CARE OF TOPEKA	)	
Respondent	)	Docket No. 1,017,368
	)	
AND	)	
	)	
AMERICAN MANUFACTURERS	)	
MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the February 21, 2005 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on July 20, 2005.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Matthew J. Hempy, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant failed to meet her burden to establish that either notice or written claim were timely made and denied compensation.

The claimant requests review of this decision as she believes that she has met both of the statutory requirements and is entitled to a 15 percent permanent partial impairment to the whole body.

Respondent requests that the Board affirm the ALJ's decision. But if the Board finds the claimant met the statutory notice and written claim requirements, then respondent asks the Board to remand this matter to the ALJ for findings on the issue of the nature and extent of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a CNA. In January of 2001, she began noticing problems with both of her hands. She immediately believed this problem was work-related.[1] According to claimant, she told her supervising nurse, a woman named Nikita in mid-February 2001 that her hands were bothering her. She further testified that Nikita told her to fill out an accident form which claimant says she did.[2] Claimant also says she indicated on the form that she was "[e]xperiencing pains in my hands, numbness, and weakness in my wrists and my hands."[3]

The record does not indicate whether in fact a person named Nikita did or did not work for respondent during 2001. And the record does not contain a copy of the accident form which claimant says she completed. Jean Noble, respondent's representative, performed a search and testified there is no accident form from claimant involving her upper extremities. There is, however, an accident form for claimant's ankle injury which occurred in May 2001. Other than that, respondent's files reflect nothing about claimant's upper extremity complaints or her subsequent medical treatment.

Claimant goes on to testify that after telling Nikita of her bilateral hand complaints, she heard nothing from respondent. Then in April 2001 she sought medical treatment from Dr. Matthew E. Bohm. Claimant says she told Nikita of this development. Claimant sought no further treatment until November 2001, again from Dr. Bohm. And in December 2001,

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[1] R.H. Trans. at 9.

[2] *Id.* at 11.

[3] *Id.*

he ordered an EMG. This test apparently confirmed that claimant had bilateral carpal tunnel, with the right being worse than the left.[4]

Claimant had surgery in January 2002 to her right hand. Claimant testified she took an excuse slip from her surgeon to Jennifer, in respondent's human resources department, letting them know why she was off work. There is no indication that she told Jennifer that her absence from work was due to a work-related injury, nor is the work release in the record. This testimony is problematic because claimant testified that she stopped working for respondent in November 2001. Respondent's records show claimant working into December 2001, but there are no records showing that claimant worked during 2002.

Nothing more happened with this claim until June 8, 2004 when claimant filed her written claim with the Division of Workers Compensation. The parties' apparently agree that there is no accident report on file with the Division relative to claimant's present claim.

Two physicians addressed the issue of claimant's functional impairment and not unexpectedly, they are rather diverse. Dr. Chris Fevurly examined claimant on December 14, 2004, and assigned a 6 percent impairment to the right upper extremity. When asked why he declined to assign any functional impairment to the left upper extremity, he testified that claimant's symptoms on the left do not, in his opinion, rise to a ratable level. While claimant admittedly has slower response times on the left, as evidenced by the EMG performed in 2001, he concluded the results were still within the normal range and only reflective of the natural deviation present from person to person.

Claimant was rated by Dr. Daniel Zimmerman in July of 2004. Dr. Zimmerman assigned a 15 percent impairment to the right upper extremity and 12 percent to the left, leaving claimant with a combined permanent impairment to the body of 15 percent. Dr. Zimmerman explained that for purposes of his left hand rating, he assigned impairment for claimant's subjective complaints of pain and demonstrated sensory deficits.

The ALJ concluded claimant failed to meet her statutory burdens set forth in K.S.A. 44-520 (timely notice of claim) and K.S.A. 44-520a (timely written claim). As a result, claimant was denied any benefits under the Act.

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the

[4] *Id.* at 14.

> employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[7]

The compensability of claimant's case hinges upon her verbal notice to Nikita and the accident form she filled out, both allegedly occurring in February 2001. While the trier of fact cannot arbitrarily or capriciously refuse to consider the testimony of any witness, it is not obliged to accept and give effect to any evidence which in its honest opinion is unreliable, even if such evidence is uncontradicted.[8]

The ALJ's Award shows that he weighed claimant's statements on the issue of notice and concluded that there was "other evidence" that rebutted her testimony.[9] This evidence included the fact that respondent's personnel file contained no accident report regarding her upper extremity. He went on to note that "[t]he more compelling evidence that no such report was ever made is that when in May 2001 the [c]laimant suffered a work

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[5] K.S.A. 44-501(a).

[6] K.S.A. 2001 Supp. 44-508(g).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[8] *Collins v. Merrick*, 202 Kan. 276, 448 P.2d 1 (1968).

[9] ALJ Award (Feb. 21, 2005) at 3.

related ankle injury the [r]espondent promptly provided treatment. Thus it appears that [r]espondent was an employer who did provide treatment when accidents were reported to it."[10] The ALJ concluded claimant did not provide notice as required by K.S.A. 44-520.

The Board has considered the evidence within the record and concludes the ALJ's finding with respect to notice should be affirmed. While it is true that respondent did not produce Nikita to deny she received notice, there is other circumstantial evidence contained within the record that calls into question the accuracy of claimant's testimony.

Claimant is, by both parties' accounts, a poor historian. She testified on one hand that she worked for respondent until November 2001, but also alleges a series of repetitive injuries up to April 2002. Respondent's pay records indicate claimant last worked no later than December 2001.

Other aspects of the facts call claimant's testimony into question. Claimant's ankle injury proceeded in what can only be described as text book fashion. It seems difficult to accept that she could know immediately in February 2001 of her work-related bilateral hand injury, give notice of that injury and then let a few months pass without investigating the lack of contact, particularly when that was the response she says she expected. Then, in May 2001 she was again injured, provided notice and received immediate medical attention. It only seems reasonable to assume that she would, in some fashion, question her employer about its failure to contact her about the bilateral hand complaints. The Board finds that by the barest of margins, the claimant has failed her burden of proof on the issue of notice, that she did not tell Nikita as she claims she did. The ALJ's Award is therefore affirmed.

Even assuming, *arguendo*, that claimant provided timely notice, the Board finds she did not file a written timely claim. K.S.A. 44-520a(a) compels a written claim to be served within 200 days after the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge. Subsection (c) of K.S.A. 44-557 provides:

> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical

[10] *Id.*

> treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

Here, claimant's written claim was not filed until June 8, 2004. There is apparently no dispute that respondent failed to file any accident report with the Division of Workers Compensation. Thus, at best, claimant had a full year in which to file her written claim.

Neither the parties or the ALJ focused on the appropriate date of accident for purposes of calculating timely written claim. At oral argument the parties seemed to suggest that December 2001, the date claimant apparently last worked was the appropriate date of accident. This date is confirmed by respondent's payroll records. Therefore, the Board adopts December 2001 as the accident date.

Claimant argues that the written accident report she allegedly tendered in February 2001 meets the statutory requirement. Failing that, she suggests the off work slip allegedly submitted in February 2002 satisfies the statutory criteria. The ALJ disagreed with these contentions and the Board affirms those findings.

It is possible to meet the statutory written claim requirements with a document other than that required by the Division of Workers Compensation. The courts have said that a written claim need not take on any particular form. Rather, the focus is on the parties' intent. The *Fitzwater* Court said:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?[11]

In this instance, neither document upon which claimant relies has been produced, so it is difficult to determine whether the purported document claimant relies upon was, in fact, a claim. All we are left with is the claimant's testimony and the surrounding circumstances. Claimant testified that she intended to recover benefits by first filling out the form in February 2001, but made no follow-up inquiries. She waited for respondent to contact her and when it did not, she proceeded to obtain medical treatment, all the while advising the doctors that her complaints were work-related. That alone may have been understandable. But in May 2001, she suffered an ankle injury and immediately after reporting that, the workers compensation process began and benefits were provided. It is difficult to understand why, if she reported this incident in February 2001 and heard nothing more, that she did not, in some way, follow-up to inquire as to the status of her claim at some point earlier than June 8, 2004. And it is difficult to know claimant's intent

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[11] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

when she submitted the off work slip to the human resources office. While she testified she wanted to get paid, she wasn't working for respondent in February 2002. Thus, it is unclear by what mechanism she believed she should be paid.

Respondent made a diligent search to determine if any written accident form was tendered. It found none. While the absence of a report is not always determinative, that fact, coupled with the claimant's lack of credibility, convinced the ALJ that claimant did not file a written claim. After reviewing the entire record, the Board affirms the ALJ's conclusion that claimant failed to provide timely written claim as required by K.S.A. 44-520a.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated February 21, 2005, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of August, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned would find this claim compensable. Claimant testified she gave her supervisor timely notice. She further testified that she was instructed to prepare an

accident report. Claimant said she then presented the completed accident report to her supervisor, Nikita, with the expectation that this was all she needed to do in order to receive medical treatment. Nikita did not testify. Other than the fact that respondent could find no record of claimant having reported her accident and injury, claimant's testimony is unrebutted. Accordingly, claimant has met her burden of proving that she gave timely notice and written claim.

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew J. Hempy, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director